No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Preap* (Pet. App. 1a-57a) is reported (without the appendices) at 831 F.3d 1193. The opinion of the court of appeals in *Khoury* (Pet. App. 58a-59a) is not published in the Federal Reporter but is reprinted at 667 Fed. Appx. 966. The opinion of the district court in *Preap* (Pet. App. 60a-106a) is reported at 303 F.R.D. 566. The opinion of the district court in *Khoury* (Pet. App. 107a-138a) is reported at 3 F. Supp. 3d 877.

JURISDICTION

In both cases, the judgment of the court of appeals was entered on August 4, 2016, and a petition for rehearing was denied on January 11, 2017 (Pet. App. 139a-140a). On April 7, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2017, and the petition was filed

on that date. The petition for a writ of certiorari was granted on March 19, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Legal Framework

The Secretary of Homeland Security (Secretary) may issue a warrant for the arrest and detention of an alien, "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 837 (2018).[1] Section 1226(a) further provides that, "[e]xcept as provided in subsection (c) of this section," the Secretary "may continue to detain the arrested alien" or "may release" him on bond or conditional parole. 8 U.S.C. 1226(a). An immigration officer at the Department of Homeland Security (DHS) initially determines whether to grant bond; the alien can then ask an immigration judge for a redetermination of that custody decision. See 8 C.F.R. 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1).

"Section 1226(c), however, carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837. Section 1226(c) requires the Secretary to detain certain criminal and terrorist aliens during their removal proceedings, without the potential for release on bond. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and

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[1] Congress has transferred from the Attorney General to the Secretary of Homeland Security the enforcement of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, but the Attorney General retains authority over the administration of removal proceedings under 8 U.S.C. 1229a and questions of law. See, *e.g.*, 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note.

fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. The first directs the Secretary to arrest certain criminal and terrorist aliens:

> The [Secretary] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. 1226(c)(1). The referenced sections make an alien removable because of certain criminal history or terrorist acts. See 8 U.S.C. 1229a(e)(2) (defining "removable"). For example, 8 U.S.C. 1227(a)(2)(A)(iii) makes an alien removable if he has been convicted of an aggravated felony. Respondents do not dispute that they

have the requisite criminal history and therefore are removable under those provisions.

Paragraph (2) is entitled "Release," and it provides:

> The [Secretary] may release an alien described in paragraph (1) only if * * * release of the alien from custody is necessary to provide protection to a witness * * * and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

8 U.S.C. 1226(c)(2); see 8 C.F.R. 236.1(c)(1)(i), 1003.19(h)(2)(i), 1236.1(c)(1)(i). The witness-protection exception is the only exception, and it does not apply here. *Jennings*, 138 S. Ct. at 847. DHS is therefore prohibited from releasing respondents if they are "alien[s] described in paragraph (1)" of Section 1226(c). 8 U.S.C. 1226(c)(2).

The Board of Immigration Appeals (BIA) has interpreted the key phrase "an alien described in paragraph (1)," concluding that an alien fits within the meaning of that phrase if he is deportable or inadmissible under any of the four lettered subparagraphs in paragraph (1), *i.e.*, if he is removable because he has the requisite criminal history or has committed the requisite terrorist acts. *In re Rojas*, 23 I. & N. Dec. 117, 125 (2001) (en banc). Under the BIA's interpretation, the flush clause at the end of paragraph (1) (beginning "when the alien is released") does not "describe[]" the alien who is subject to mandatory detention, but rather identifies when the Secretary's duty to arrest that alien is triggered. *Id.* at 121. Therefore, the BIA explained, that clause does not narrow paragraph (2)'s prohibition against releasing criminal aliens during their removal proceedings. See *id.* at 120-125.

The BIA accordingly held in *Rojas* that an alien with the requisite criminal history does not become exempt from mandatory detention if he is not immediately taken into custody by DHS. 23 I. & N. Dec. at 127. After reviewing the statute's text, context, and history, as well as practical considerations, the BIA concluded that it would be "inconsistent with [the BIA's] understanding of the statutory design to construe [Section 1226(c)] in a way that permits the release of some criminal aliens, yet mandates the detention of others convicted of the same crimes, based on whether there is a delay between their release from criminal custody and their apprehension by [DHS]." *Id.* at 124.

B. Facts And Procedural History

1. *The* Preap *case*. On December 12, 2013, the *Preap* respondents brought a putative class action in the United States District Court for the Northern District of California. Lead plaintiff Mony Preap is a lawful permanent resident alien with two drug convictions from 2006 that triggered mandatory detention under Section 1226(c). Pet. App. 63a-64a. He was released from criminal custody in 2006, and DHS took him into immigration custody in September 2013. *Ibid.*[2]

The district court certified a class consisting of all aliens in California "who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." Pet.

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[2] Earlier in 2013, Preap had been arrested for inflicting severe corporal injury on a spouse or domestic partner, and had pleaded guilty to battery. Pet. App. 64a. That conviction did not trigger Section 1226(c). *Ibid.*

App. 8a. The *Preap* respondents contended that they were exempt from mandatory detention under Section 1226(c), notwithstanding that they had committed predicate offenses specified in that Section, on the theory that Section 1226(c)(2)'s detention mandate does not apply unless DHS takes the alien into custody immediately "when the alien is released." See *id.* at 3a-4a.

On May 15, 2014, the district court entered a preliminary injunction in favor of the *Preap* respondents. Pet. App. 60a-106a. The court agreed with their interpretation of Section 1226(c) and held that the class members were exempt from mandatory detention because DHS had not taken them into immigration custody "immediately upon release from criminal custody." *Id.* at 61a. The court entered a preliminary injunction requiring the government to provide bond hearings to all class members. *Ibid.*; see *id.* at 95a, 105a-106a.

The court of appeals affirmed. Pet. App. 1a-57a. The court recognized that four circuits had "sided with the government" by ruling that a gap in custody is irrelevant to the application of mandatory detention under Section 1226(c). *Id.* at 4a; see *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018); *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1327 (10th Cir. 2015); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 161 (3d Cir. 2013); *Hosh* v. *Lucero*, 680 F.3d 375, 382-384 (4th Cir. 2012); see also *Castañeda* v. *Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (dividing evenly on whether a criminal alien becomes exempt after a delay of several years). The court nonetheless rejected that position and declined to accord deference to the BIA's decision in *Rojas*. Instead, the court held that the "when the alien is released" clause in Section 1226(c)(1) unambiguously exempts a criminal

alien from mandatory detention under Section 1226(c)(2) unless he is taken into custody "promptly" upon his release. Pet. App. 6a. The court also rejected the government's argument that, even if the "when the alien is released" clause mandates action by DHS within a specified time and DHS does not act until later, the consequence is not to provide the criminal alien with the opportunity for release through a bond hearing. *Id.* at 23a-27a. But see *Sylvain*, 714 F.3d at 157-161 (accepting this argument); *Hosh*, 680 F.3d at 381-383 (same).

2. The *Khoury* case. On August 1, 2013, the *Khoury* respondents brought a putative class action in the United States District Court for the Western District of Washington, similarly contending that criminal aliens become exempt from mandatory detention if DHS does not arrest them immediately upon their release from criminal custody. Lead plaintiff Bassam Yusuf Khoury is a lawful permanent resident who has a 2011 conviction for attempted manufacture or delivery of a controlled substance, which triggers mandatory detention under Section 1226(c). *Khoury* D. Ct. Doc. 19, at 5 (Aug. 14, 2013). He was released in June 2011, and DHS arrested him in April 2013. Pet. App. 109a-111a.[3]

The district court certified a class consisting of all aliens in the Western District of Washington "who were subjected to mandatory detention under 8 U.S.C.

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[3] Another named plaintiff, Alvin Rodriguez Moya, was arrested by DHS when he was at large following a drug conviction. He was later given a bond hearing under the Ninth Circuit decision at issue in *Jennings*, and released. See *Khoury* D. Ct. Doc. 54, at 1-2 (May 8, 2015). After his release, Rodriguez Moya was arrested for and found guilty of first-degree attempted murder of his ex-girlfriend, and first-degree murder of her new boyfriend. See Jury Verdict, *State* v. *Rodriguez-Moya*, No. 3AN-15-03906CR (Alaska Sup. Ct. Dec. 6, 2017); Order Denying Mot. for a New Trial, at 1-3 (Mar. 6, 2018).

§ 1226(c) even though they were not detained immediately upon their release from criminal custody." Pet. App. 58a-59a. And the court granted summary judgment to the respondents, declaring that Section 1226(c) "applies only to aliens who are detained immediately upon their release from criminal custody." *Id.* at 59a.

Relying on its decision in *Preap*, the court of appeals affirmed. Pet. App. 58a-59a.

3. The court of appeals denied rehearing en banc in both cases. Pet. App. 139a-140a.

SUMMARY OF ARGUMENT

A detained criminal alien is subject to mandatory detention under Section 1226(c), regardless of whether DHS arrested him immediately upon his release from criminal custody. Indeed, the court of appeals' holding that the consequence of DHS not arresting a criminal alien immediately is to furnish the alien a bond hearing —thus giving him the opportunity to be released and potentially commit further crimes or flee—is contrary to the statute's text, context, purpose, and history, as well as this Court's precedent interpreting similar provisions, and would give rise to serious practical problems. Moreover, the BIA has squarely rejected that interpretation of Section 1226(c). See *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc). The BIA adopted by far the best reading of the statute, and at a minimum its decision warrants deference. The court of appeals' contrary decision should be reversed.

I. A. Paragraph (1) of Section 1226(c) mandates that the Secretary "shall" take custody of certain aliens, and paragraph (2) prohibits the Secretary from releasing "an alien described in paragraph (1)." 8 U.S.C. 1226(c). Paragraph (1) describes those aliens, in four

indented subparagraphs, in terms of their criminal history or terrorist activities. It provides that the Secretary must arrest "any alien who—is inadmissible" or "is deportable" because of specified criminal history or terrorist activities. 8 U.S.C. 1226(c)(1)(A)-(D). The Secretary therefore is prohibited from releasing from DHS custody "any alien who" is removable because he has the requisite criminal history.

Paragraph (1)'s further phrase "when the alien is released" does not describe an alien at all. That is the function of the proceeding four subparagraphs, which are introduced "any alien *who*." 8 U.S.C. 1226(c)(1) (emphasis added). Indeed, "when the alien is released" takes as a given that "the alien" has already been fully described. *Ibid.* Otherwise, the Secretary would not know who "the alien" is. That clause thus does not narrow the scope of the prohibition against release. Instead, it tells the Secretary what to do with respect to that previously-described alien: She should arrest him "when the alien is released." Accordingly, once DHS has arrested a covered criminal alien, DHS must continue detaining him, regardless of when the arrest occurred: The alien is "an alien described in paragraph (1)" and paragraph (2) expressly prohibits the Secretary from releasing him. 8 U.S.C. 1226(c)(2).

B. The statutory context and purpose reinforce the point that continued detention is mandatory regardless of whether DHS arrests a criminal alien immediately upon his release from criminal custody. Congress enacted Section 1226(c) "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003). In particular, evidence showed that the

Immigration and Naturalization Service (INS) was slow in arresting criminal aliens and that, when it did, immigration judges would often release those aliens on bond—and they would thereafter frequently flee or reoffend. *Ibid.* Section 1226(c) eliminates the need for immigration judges to make inherently difficult predictions about which criminal aliens will flee or reoffend, and entirely eliminates the risk that criminal aliens will do so by mandating continued detention of any alien with the requisite criminal history.

Under the BIA's decision in *Rojas*, a criminal alien does not become exempt from that mandate simply because DHS cannot or does not arrest him immediately upon his release from criminal custody. The court of appeals' interpretation, by contrast, would reintroduce the very risks that Congress enacted Section 1226(c) to eliminate. For a substantial number of criminal aliens, it would put immigration judges back into the business of trying to predict which criminal aliens will pose a flight risk or danger, and thus reintroduce the risk that released criminal aliens will flee or reoffend. Moreover, a criminal alien would be rewarded with a bond hearing on the basis of a factor—a gap in custody—that has no connection to the alien's criminal history and is irrelevant for all other immigration purposes.

C. The court of appeals' interpretation also gives rise to significant practical problems because DHS cannot always be standing at the jailhouse door waiting to take custody of every criminal alien at the very moment he is released. As a matter of government resources, DHS may be unable to send agents to make an arrest at the precise time and place of release, wherever or whenever that may occur nationwide. Moreover, gaps in custody

are often caused by factors entirely beyond the government's control. In particular, DHS cannot send agents to arrest an alien immediately upon his release unless DHS knows when and where that is going to occur. But many jurisdictions do not provide that information to DHS, making it effectively impossible for DHS to arrest every criminal alien immediately upon his release.

D. This Court's precedents further underscore that rewarding a criminal alien with the opportunity to seek release is not a proper consequence of any delay in arresting him. This Court has repeatedly held that when Congress has determined that governmental action is so important that it "shall" occur within some specified time, but the government does not act until later, it is not appropriate for courts to order that the public be deprived of the benefits that Congress mandated the government's action to produce. See, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-158 (2003); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-721 (1990).

This common-sense principle strongly supports the BIA's interpretation. The whole point of Section 1226(c) is to protect the public by requiring the arrest of criminal aliens and prohibiting any opportunity for them to be released once they are arrested, and thus preventing criminal aliens from fleeing or committing further crimes during the pendency of their removal proceedings. Affording such criminal aliens the opportunity for release if the government is delayed in arresting them would completely subvert this scheme. "[A] dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous

criminals." *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 160-161 (3d Cir. 2013).

E. Congress's enactment of Section 1226(c) is also properly understood to ratify the government's preexisting view that continued detention is mandatory for any detained alien with the requisite criminal history, regardless of any gap in custody. Congress enacted Section 1226(c) against the backdrop of prior statutes mandating the arrest and prohibiting the release of aliens with certain criminal history. *E.g.*, 8 U.S.C. 1252(a)(2) (1988). Moreover, the government had issued binding regulations interpreting the general prohibition against release in those provisions to extend to any detained alien with the requisite criminal history, regardless of any gap in custody. *E.g.*, 8 C.F.R. 242.2(c)(1) (1991).

In light of that historical and regulatory backdrop, if Congress had wanted to create a new gap-in-custody exception, it would have clearly expressed that change in law. Congress did nothing of the sort. Section 1226(c) is thus properly understood to provide that detention is mandatory for any detained alien with the requisite criminal history, regardless of any gap in custody.

II. The BIA thus adopted by far the best interpretation of Section 1226(c) in its decision in *Rojas*. If anything, in light of the statutory text, context, purpose, and history, and this Court's precedents addressing the remedy for governmental delay, the BIA's interpretation is unambiguously correct. At a minimum, the BIA's interpretation is reasonable, and its decision is therefore binding under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

CRIMINAL ALIENS DO NOT BECOME EXEMPT FROM MANDATORY DETENTION IF THE DEPARTMENT OF HOMELAND SECURITY DOES NOT TAKE THEM INTO IMMIGRATION CUSTODY IMMEDIATELY UPON THEIR RELEASE FROM CRIMINAL CUSTODY

Respondents have the requisite criminal history to trigger mandatory detention under Section 1226(c), and the only exception to that mandate does not apply here. Accordingly, Section 1226(c) mandates that, once DHS has arrested respondents, they must remain in detention during their removal proceedings. Any delay by DHS in arresting them does not exempt them from mandatory detention.

I. Section 1226(c) Is Best Interpreted Not To Reward Criminal Aliens With The Opportunity For Release If DHS Does Not Arrest Them Immediately

A. Section 1226(c)'s Text And Structure Show That Criminal Aliens Do Not Become Exempt From Mandatory Detention If DHS Fails To Arrest Them Immediately

1. Paragraph (2) of Section 1226(c) provides that the Secretary "may release an alien described in paragraph (1)" of that section "only if" the narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2). That exception does not apply here, and Section 1226(c) contains no other exceptions. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847 (2018). Respondents are therefore subject to mandatory detention during their removal proceedings because they are "alien[s] described in paragraph (1)." 8 U.S.C. 1226(c)(2).

"Describe" means "to represent or give an account of in words"; "express, explain, set forth, relate, recount, narrate, depict, delineate, portray," or, more loosely,

"to convey an image or notion of," "trace or traverse the outline of," or "convey an idea or impression of." *Torres v. Lynch*, 136 S. Ct. 1619, 1625 nn.3-4 (2016) (citations omitted) (collecting and quoting dictionary definitions).

Paragraph (1) describes aliens based on their personal criminal histories or terrorist activities. Paragraph (1) provides that the Secretary "shall take into custody any alien *who*—is inadmissible" or "is deportable" because of certain criminal or terrorist activity set forth in four indented and lettered subparagraphs. 8 U.S.C. 1226(c)(1)(A)-(D) (emphasis added). That clause is then followed by a distinct clause, set forth flush to the margin, stating: "*when* the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. 1226(c)(1) (emphasis added).[4]

In *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc), the BIA correctly held that the pertinent phrase in paragraph (2)'s prohibition against release—its reference to "an alien described in paragraph (1)"—refers "to an alien described by one of four subparagraphs, (A) through (D)." *Id.* at 121. As a matter of grammar, the word "who" followed by those subparagraphs constitute an adjectival clause that describes who such an alien is: "any alien *who—is* inadmissible" or "*is* deportable" for one of the enumerated reasons. 8 U.S.C. 1226(c)(1) (emphases added). Those subparagraphs thus set forth the characteristics of the individual aliens who are subject to mandatory detention under Section 1226(c). And

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[4] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-585 (same structure as enacted).

they do so based on *the alien's own conduct* that sensibly warrants mandatory detention: his commission of a sufficiently serious criminal offense or terrorist act (*e.g.*, an aggravated felony) that renders him removable.

By contrast, the clause that follows—"when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense," 8 U.S.C. 1226(c)(1)—does not describe an alien at all, and thus does not narrow the scope of the prohibition against release. That clause does not express, set forth, or convey any attributes or characteristics of any person, in loose or precise terms. Indeed, that clause takes it as a given that "*the alien*" has already been fully described. *Ibid.* (emphasis added). The phrase "when the alien is released" makes little sense unless the Secretary already knows who "the alien" is, and thus knows who to arrest in the first place. *Ibid.*

Rather than modifying the noun "alien" by describing *who* is subject to arrest and mandatory detention, "when the alien is released" is an adverbial clause that modifies "shall take into custody." Specifically, that clause specifies "*when*" the duty of the Secretary to arrest a covered criminal alien applies. 8 U.S.C. 1226(c)(1). The Secretary thus has an obligation under paragraph (1) to take a covered alien into custody, and that obligation applies "when the alien is released." And under paragraph (2), once the Secretary arrests such a criminal alien, she must in any event continue detaining him during his removal proceedings, regardless of when his custody began.

A practical example illustrates the structural point. If somebody gave you a two-sentence shopping list saying "(1) Pick up milk, eggs, and cheese when the store opens"; and "(2) refrigerate the groceries described above," no sensible person would believe that, if you did not pick up the milk, eggs, or cheese until long after the store first opened, you could leave them out on the counter rather than put them in the refrigerator. The timing of when to get the groceries (when the store opens) does not say which groceries to buy. And that timing is entirely distinct from the need to refrigerate milk, eggs, and cheese, which exists regardless of when they are purchased.

Here, Congress's use of lettered subparagraphs to describe in precise terms who the Secretary shall arrest and detain makes the statute somewhat denser, but it does not alter this basic point. The Secretary has an obligation to arrest those criminal and terrorist aliens "when [they are] released." 8 U.S.C. 1226(c)(1). But whenever the Secretary arrests them, she must keep them in custody unless the witness-protection exception applies. 8 U.S.C. 1226(c)(2). And although Congress could have referred to aliens "described in subparagraphs (A) through (D) of paragraph (1)" instead of aliens "described in paragraph (1)," the language Congress used is simpler and perfectly accurate. There is nothing odd about Congress's use of the phrase "an alien described in paragraph (1)" to refer to any alien with the requisite criminal history, *ibid.*, because the adverbial clause "when the alien is released" appearing later in paragraph (1) does not describe the alien at all. So Congress did not need to be any more specific to direct that mandatory detention applies to any alien with the

requisite criminal history, regardless of whether DHS was delayed in arresting him in the first place.

The distinct role of the "when the alien is released" clause thus is manifested in its text, which is introduced by "when" and thereby separated from the prior description of "who." 8 U.S.C. 1226(c)(1). And it is manifested in the paragraph's structure, in which the "when the alien is released" clause is set out flush to the margin, following the four indented subparagraphs (A) through (D) that describe the aliens who are the object of the Secretary's duty. *Ibid.*

Moreover, regardless of its function within the structure of the statute, the phrase "when the alien is released" does not itself impose a duty that applies only at the moment of release. That clause standing alone could be read to mean either "at or during the time that" ("while") the alien is released, or "just after the moment that" he is released. *Webster's Third New International Dictionary* 2602 (2002) (*Webster's*) (capitalization altered); cf. *United States* v. *Willings & Francis*, 8 U.S. (4 Cranch) 48, 55 (1807) (Marshall, C.J.) ("That the term ['when'] may be used, and, either in law or in common parlance, is frequently used in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration."); see *Hosh* v. *Lucero*, 680 F.3d 375, 379-380 (4th Cir. 2012) (finding "when" ambiguous in Section 1226(c)). In context, "when" is best understood to mean "while," imposing a duty to arrest a criminal alien that begins at the time the alien is first released and continues during any time the alien remains at large. The mandate to arrest thus does not have an expiration date, much less does it expire immediately. In any event, regardless of how "when" is construed,

once DHS has arrested an alien with the requisite criminal history, paragraph (2) expressly forbids DHS from releasing him.

2. Respondents have contended (Br. in Opp. 23-24) that interpreting "when the alien is released" to tell the Secretary when to arrest criminal aliens (but not to exempt them from mandatory detention) would render that phrase superfluous. Respondents have asked, "when else could the [Secretary] take an alien into custody except when he or she is released?" *Id.* at 23 (citation omitted). The answer is that the Secretary otherwise could potentially take the alien into immigration custody *before* he is released from criminal custody.

For aliens who are in federal criminal custody, Congress thereby ensured that they will serve their entire period of incarceration before DHS is obligated to take them into custody for removal proceedings. For aliens who are in state custody, Congress similarly made clear that the Secretary should not attempt to take them from a state jail or penitentiary, and instead should wait for the coordinate sovereign to release the alien from any term of imprisonment. Section 1226(c) thus embodies basic values of cooperation and comity between the federal government and the several States, allowing them to complete the basic punishment of a criminal alien for committing a state crime, before the federal government will take custody for removal proceedings. See also 8 U.S.C. 1231(a)(4)(A) (bar against actually removing "an alien who is sentenced to imprisonment until the alien is released from imprisonment"); 8 U.S.C. 1228(a)(3)(B) (similar bar for expedited removal of aliens convicted of aggravated felonies).

3. If Congress had intended to exempt criminal aliens from mandatory detention under Section 1226(c)

based on delay in arresting them, it easily could have done so—and it presumably would have answered the "nose-on-the-face obvious" question of how long a delay is too long. *Castañeda* v. *Souza*, 810 F.3d 15, 51 (1st Cir. 2015) (opinion of Kayatta, J.).

The natural place to add an exception to paragraph (2)'s detention mandate would have been in paragraph (2) itself. Paragraph (2) provides that DHS "may release" a covered criminal alien from detention "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). Congress could easily have added a second exception, saying, "or if the alien was not taken into custody immediately" or "promptly." Congress did not do so. Instead, its direction that DHS may release such a criminal alien "only if" the witness-protection exception is satisfied "expressly and unequivocally imposes an affirmative *prohibition* on releasing detained aliens under any other conditions." *Jennings*, 138 S. Ct. at 847.

In contrast, it would have been quite unusual to add an exception to paragraph (2) by changing the wording of paragraph (1). But Congress could have done that as well. Paragraph (2)'s prohibition against release applies to "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). Thus, for example, Congress might have provided, "The Secretary shall take into custody any alien who is removable because of his criminal history *and who has been released from criminal custody for no more than X amount of time*." That language would use the timing of custody as part of the description of the alien who is subject to the detention mandate ("any alien * * * who has been released from criminal custody for no more than X amount of time"). And in so doing, Congress would have adopted an express time limitation for

being subject to mandatory detention, which is effectively what respondents seek.[5] At the same time, however, that change to paragraph (1) would have introduced other problems, because it would also extinguish the Secretary's obligation to arrest the criminal alien in the first place if the Secretary were delayed.

But those problems aside, the language Congress actually enacted in paragraph (1) is strikingly different. First, the statute is missing the transition needed to make grammatical an additional description of the alien ("an alien who is removable because of his criminal history *and who* . . . "). Second, the subject of the distinct "when" clause is different. Rather than describing who is subject to mandatory custody, the language Congress actually enacted tells the Secretary when her duty to arrest "the alien" is triggered: "when the alien is released." 8 U.S.C. 1226(c)(1). Third, unlike the phrase "and who has been released from criminal custody for not more than X amount of time," the actual statute is missing something every statute-of-limitations-like provision must contain: It does not specify a limitations period. See, *e.g.*, 18 U.S.C. 3282(a) ("within five years"); 28 U.S.C. 2401(a) ("within six years"). That omission strongly suggests that Congress did not intend to exempt a criminal alien from mandatory detention if DHS

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[5] To adopt the result respondents seek, Congress could not have simply provided: "The Secretary shall take into custody any alien who is removable because of his criminal history *and who is taken into immigration custody immediately upon his release from criminal custody*." Cf. Pet. App. 8a (*Preap* class definition). That would specify the time limit (immediate), but the mandate would be circular: The determination of who to arrest would depend on when that person was arrested. Adding a gap-in-custody exception to paragraph (1) thus would require additional statutory surgery.

is delayed, because Congress did not say how long a delay is too long—unless Congress intended the extremely unlikely result that *any* gap in custody, no matter how brief or justified, would confer the windfall of possible release on the criminal alien. Cf. *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015) ("That version of the argument has the virtue of resting on a general principle—but the vice of being implausible.").

As a result of that omission, the court of appeals' interpretation gives rise to grave line-drawing problems. See *Castañeda*, 810 F.3d at 51 (opinion of Kayatta, J.). Is anything slower than an instantaneous transfer too long? One minute? One hour? One day? One month? One year? Five years? If the deadline is not a bright-line time limit but a standard like "prompt" or "within a reasonable time," what does that mean and what factors are relevant? Would DHS get more time if it did not have the resources to send an agent to make the arrest at the time the alien was being released? What if DHS did not even know when the criminal alien was going to be released? "What if the state prison" or county jail "does not cooperate, making it impossible for federal agents to know when the alien will leave state custody?" *Ibid.* "What if the alien hides?" *Ibid.* What if the alien uses a fake identity or aliases? "What if the alien commits a new crime" that would not itself trigger mandatory detention? *Ibid.* Would it depend on the severity of the alien's underlying crimes? The statute provides no answers to any of these questions—nor does it even suggest how an agent in a DHS field office or an immigration judge would go about answering them. The natural inference is that Congress did not intend for a delay in custody to be relevant at all.

B. The BIA's Interpretation Advances Congress's Purpose Of Preventing Flight And Recidivism By Criminal Aliens

Section 1226(c)'s context and purpose further confirm that it mandates continued detention of all aliens with the requisite criminal history, regardless of whether DHS was delayed in arresting them.

1. Beginning in 1988, Congress began incrementally amending the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to constrain the Executive's discretion to release criminal aliens on bond. See *Demore* v. *Kim*, 538 U.S. 510, 520-521 (2003); pp. 30-35, *infra* (detailing history). Nonetheless, removable criminal aliens continued to reoffend and flee at alarming rates, giving rise to a "serious and growing threat to public safety." S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995) (Senate Report). One study showed that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Demore*, 538 U.S. at 518. And after release on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519; see *id.* at 520 (discussing subsequent study finding that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings"). Furthermore, the INS was slow in arresting and removing criminal aliens, with one study showing "that, at the then-current rate of deportation, it would take 23 years to remove every criminal alien already subject to deportation." *Id.* at 518.

In response to that "wholesale failure by the INS to deal with increasing rates of criminal activity by aliens," Congress enacted Section 1226(c) in 1996. *Demore*,

538 U.S. at 518. Section 1226(c) embodies Congress's categorical judgment that aliens who are removable because they have the requisite criminal history pose an undue risk of flight and danger to the community—and that individual DHS officers and immigration judges should no longer be in the business of trying to predict which criminal aliens will actually flee or reoffend. See *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) ("[T]he animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens."), cert. denied, 138 S. Ct. 1547 (2018). Section 1226(c) eliminates those risks for covered criminal aliens by prohibiting their release. And in *Demore*, this Court held that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528.

"Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122; see *Demore*, 538 U.S. at 513 (discussing Congress's concerns about risks posed by "deportable criminal aliens who are not detained"); *e.g.*, Senate Report 2 ("nondetained criminal aliens"). In light of real-world experience with recidivism and flight by criminal aliens, Congress "eliminated all discretion" and mandated the detention of aliens with the requisite criminal history during their removal proceedings. *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 159 (3d Cir. 2013). Indeed, many provisions of the immigration laws are "aimed at expediting the removal of aliens, and that is especially true for criminal aliens such as those who fall within subparagraphs (A) through (D)." *Rojas*, 23 I. & N. Dec. at 121.

By contrast, the court of appeals' interpretation of Section 1226(c) would undermine Congress's basic purpose by exempting removable criminal aliens from mandatory detention, thereby re-enabling the very problems of flight and recidivism by "deportable criminal aliens who are not detained" that Congress enacted Section 1226(c) to prevent. *Demore*, 538 U.S. at 513. If a DHS officer or immigration judge were to release a criminal alien on bond, the alien would have the opportunity to flee (and thus evade removal) or to commit more crimes, which otherwise would have been prevented. Moreover, a rule that a criminal alien becomes exempt from mandatory detention if he is not taken into immigration custody within some period of time would create an added incentive for criminal aliens to flee or go into hiding the moment they are released from criminal custody, to avoid immigration custody for as long as possible and, if ever arrested, to gain the advantage of the possibility of release that otherwise would have been foreclosed.

To make matters worse, criminal aliens would become exempt from mandatory detention based on a factor—a gap in custody—that has nothing to do with the alien's criminal history, dangerousness, or flight risk. Indeed, a gap in custody "is irrelevant for all other immigration purposes." *Rojas*, 23 I. & N. Dec. at 122. None of the INA's provisions governing the initiation of removal proceedings or defining who is removable depends on whether there has been a gap in custody. See 8 U.S.C. 1182(a), 1225(b), 1227, 1228, 1229, 1229a. The existence or duration of a gap in custody is similarly irrelevant to any application for relief from removal. See *Rojas*, 23 I. & N. Dec. at 122. And the INA does not include a statute of limitations for initiating removal

proceedings against a criminal alien—much less a provision exempting criminal aliens from removal proceedings if those proceedings are not initiated within some period of time following the alien's release from criminal custody. *E.g.*, *Adams* v. *Holder*, 692 F.3d 91, 106 (2d Cir. 2012) ("[T]he INA places no time limits on the Attorney General's power to initiate removal proceedings against any alien.").[6] It is thus highly unlikely that Congress buried in the "when the alien is released" clause of paragraph (1) a novel and counterproductive rule that a criminal alien becomes exempt from mandatory detention if he happens not to be arrested by immigration authorities for some period of time after release from criminal custody—and all the more so if he is not arrested immediately.

C. The BIA's Interpretation Avoids Serious Practical Problems

"[T]he BIA's interpretation has the added benefit of accounting for practical concerns arising in connection with enforcing the statute." *Lora* v. *Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018). "As the BIA explained in *Rojas*, '[i]t is difficult to conclude that Congress meant to premise the success of its mandatory detention scheme on the capacity of [DHS] to appear at the jailhouse door to take custody of an alien at the precise moment of release.'" *Ibid.* (quoting *Rojas*, 23 I. &. N. Dec. at 128) (brackets in original). "Particularly for criminal aliens in state custody," the Second Circuit has

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[6] The INA imposes a five-year limitations period for administrative rescission of adjustment of status to that of a lawful permanent resident, 8 U.S.C. 1256(a), but a gap in custody is irrelevant under that provision as well.

explained, "it is unrealistic to assume that DHS will be aware of the exact timing of an alien's release from custody, nor does it have the resources to appear at every location where a qualifying alien is being released." *Id.* at 612-613; see Senate Report 2 (discussing how resource constraints hampered the INS's enforcement efforts against criminal aliens).

Indeed, gaps in custody are often caused by reasons outside the federal government's control. To facilitate its efforts to take criminal aliens into custody, U.S. Immigration and Customs Enforcement (ICE) often sends requests to state or local jurisdictions known as "detainers": ICE requests the jurisdiction to notify it in advance when a particular criminal alien is to be released from custody, and to hold the alien in custody for up to 48 hours thereafter to enable ICE officers to effectuate the arrest in an orderly manner. See 8 C.F.R. 287.7(a) and (d). State and local jurisdictions do not always cooperate with those requests, however. For example, ICE reported for fiscal year 2016 that its enforcement and removal officers "documented a total of 21,205 declined detainers in 567 counties in 48 states including the District of Columbia between January 1, 2014, and September 30, 2016." ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report* 9 (*2016 Report*); see ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* 9 (reporting 19,162 declined detainers in fiscal years 2015 through 2017). "Declined detainers result in convicted criminals being released back into U.S. communities," ICE has explained, thus creating gaps in custody "notwithstanding ICE's requests for transfer of those individuals." *2016 Report* 9. The court of appeals' interpretation would thus frustrate DHS's ability to remove inadmissible and deportable

criminal aliens from the United States, in contravention of Congress's basic purpose.

It is also particularly unlikely that Congress made the success of its mandatory-detention regime dependent upon obtaining perfect cooperation from States and localities. The detention here is an integral part of the federal government's program to remove criminal aliens from the United States, which is a process "entrusted to the discretion of the Federal Government." *Arizona* v. *United States*, 567 U.S. 387, 409 (2012). It would thus be unusual to give an alien greater rights in those federal proceedings (the right to a bond hearing and possible release) if a State or locality had been *less* cooperative before those proceedings began.

Moreover, at the time Congress enacted Section 1226(c), imperfect cooperation was already an issue. Some jurisdictions had "enacted laws, often referred to as refuge, sanctuary or non-cooperation laws, that prohibit or limit local government employees' cooperation with the INS." Senate Report 28; see *id.* at 28-30. There is no hint that Congress viewed a lack of state or local cooperation as a potential basis for conferring on a removable criminal alien the windfall of an opportunity for release from immigration detention. Rather, the Senate Report explained that such laws made "effective governmental response to the problem of criminal aliens substantially more difficult." *Id.* at 30.

D. This Court's Decisions Further Confirm That The BIA's Decision Is Correct

This Court's precedents further support the BIA's conclusion that mandatory detention under Section 1226(c) is not limited to criminal aliens who were taken into custody immediately. This Court has repeatedly held that statutes providing that "the Government

'shall' act within a specified time, without more," are not "jurisdictional limit[s] precluding action later." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003); see *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."); *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986) (stating that the Court "would be most reluctant to conclude that every failure of an agency to observe" a deadline "voids subsequent agency action, especially when important public rights are at stake").

For example, the Court held in *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), that "a provision that a detention hearing 'shall be held immediately upon the [detainee's] first appearance before the judicial officer' did not bar detention after a tardy hearing." *Barnhart*, 537 U.S. at 159 (quoting *Montalvo-Murillo*, 495 U.S. at 714) (brackets in original). Otherwise, "every time some deviation from the strictures" of the statute were to occur, the Court explained, it would "bestow upon the defendant a windfall" and "visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants." *Montalvo-Murillo*, 495 U.S. at 720.

Those same considerations strongly support the BIA's interpretation of Section 1226(c). Exempting criminal aliens from mandatory custody if the government is delayed arresting them "would lead to an outcome contrary to the statute's design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline," and thus would "reintroduce[] discretion into the process and bestow[] a windfall upon dangerous

criminals." *Sylvain*, 714 F.3d at 160-161; see *Lora*, 804 F.3d at 612; *Olmos* v. *Holder*, 780 F.3d 1313, 1324-1326 (10th Cir. 2015); *Hosh*, 680 F.3d at 381-383.

In breaking from its sister circuits, the Ninth Circuit described *Montalvo-Murillo* and *Barnhart* as a "'loss-of-authority' line of cases," Pet. App. 23a, and distinguished Section 1226(c) on the ground that DHS would not lose its authority to detain the criminal aliens here. The Ninth Circuit reasoned that DHS could still detain those aliens under 8 U.S.C. 1226(a), so long as it provided a bond hearing and the alien was denied bond or failed to post bond. See Pet. App. 23a-27a. But that reasoning misses the very purpose of Section 1226(c). Under the Ninth Circuit's decision, DHS *does* lose its authority—indeed, obligation—to execute Congress's directive for *mandatory* detention of criminal aliens.

The Ninth Circuit's reasoning also misapprehends the rationale of this Court's precedents. Those decisions reflect the common-sense point that important action is better late than never. When Congress has concluded that an objective is so important that it has affirmatively directed the government to act in some amount of time to accomplish it, then this Court will assume (absent a demonstration to the contrary) that if the government acts after that time, the public will not lose the benefit of that action. See *Barnhart*, 537 U.S. at 159 ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.") (citation omitted); *Sylvain*, 714 F.3d at 158 ("Bureaucratic inaction—whether the result of inertia, oversight, or design—should not rob the public of statutory benefits").

In *Montalvo-Murillo*, Congress enacted the relevant provision to protect the public by providing for detention itself. See 495 U.S. at 719-721. Here, Congress enacted Section 1226(c) to protect the public by providing for *mandatory* detention, *i.e.*, by mandating the arrest and prohibiting the release of criminal aliens during removal proceedings and thereby adding assurance that they will not flee or commit further crimes. But in both cases, if the government is tardy, there is no basis for the consequence that the Ninth Circuit imposed: Depriving the public of the protection for which Congress required action in the first place.

It is thus no answer to suggest that, if the government is late in arresting a removable criminal alien, the alien becomes exempt from mandatory custody but the government would still have authority to continue detaining him if it gives him a bond hearing and he is denied bond. The whole point of Section 1226(c)(2) is to benefit the public by *eliminating* release of detained criminal aliens by immigration officers or immigration judges, and thereby eliminating the possibility that they will release a criminal alien who will thereafter flee or commit further crimes. See *Demore*, 538 U.S. at 513, 520. Any delay by the government therefore should not deprive the public of the very protection Congress sought to provide.

E. Section 1226(c)'s History Shows That Congress Intended To Prohibit Release Of All Aliens With The Requisite Criminal History

The historical backdrop against which Congress enacted Section 1226(c) further confirms that the BIA's interpretation of the statute is correct. Indeed, Congress has repeatedly ratified the Executive's longstand-

ing view that the general prohibition against release applies to any alien with the requisite criminal history, regardless of any gap in custody.

1. Congress first mandated detention of criminal aliens during removal proceedings in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470 (8 U.S.C. 1252(a)(2)). That provision consisted of two sentences that are similar to the two sentences in Section 1226(c). See *Rojas*, 23 I. & N. Dec. at 122-123. The first sentence directed that the Attorney General "shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." 8 U.S.C. 1252(a)(2) (1988). The second contained a general prohibition against release, providing that "the Attorney General shall not release such felon from custody." *Ibid.*

To the extent it was ambiguous whether "such felon" meant "any alien convicted of an aggravated felony" (or only such felons who were actually arrested by immigration authorities immediately "upon completion of the alien's sentence"), 8 U.S.C. 1252(a)(2) (1988), the INS resolved the ambiguity by adopting the former interpretation. The INS promulgated regulations directed at immigration officers, providing that "in the case of a respondent convicted * * * of an aggravated felony," the alien "*shall not be released from custody* unless" a removal order had already been entered and certain criteria were satisfied. 55 Fed. Reg. 24,858, 24,859 (June 19, 1990) (8 C.F.R. 242.2(c)(1)) (emphasis added).[7] The regulations thus flatly prohibited the release on bond of any alien with the requisite criminal history.

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[7] Detention after the entry of a final order of removal is now governed by a separate statute, 8 U.S.C. 1231. See *Zadvydas* v. *Davis*, 533 U.S. 678, 698 (2001).

2. Congress returned to the subject of mandatory detention of criminal aliens in 1990 and 1991. See Immigration Act of 1990, Pub. L. No. 101-649, § 504, 104 Stat. 5049 (Nov. 29, 1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751. As amended, the INA retained the mandate to arrest any alien convicted of an aggravated felony, and retained the general prohibition against releasing "such felon" from custody. 8 U.S.C. 1252(a)(2) (1988 & Supp. IV 1992). But Congress added an express exception that allowed the release of "any lawfully admitted alien who has been convicted of an aggravated felony," so long as he demonstrated that he was not a flight risk or a danger. *Ibid.*[8]

Those amendments confirm that there was no gap-in-custody exception. First, the fact that the new statutory exception reached "any lawfully admitted alien" with the requisite criminal history—regardless of when he was taken into immigration custody—indicates that the general prohibition against releasing "such felon" similarly did not depend on when the criminal alien was taken into immigration custody. See *Rojas*, 23 I. & N. Dec. at 123. Otherwise, the exception would be broader than the general rule. *Ibid.*

Second, Congress amended the statute against the backdrop of INS regulations that interpreted the prohibition against releasing "such felon" to bar release of any detained alien with the requisite criminal history. See 55 Fed. Reg. at 24,859. Yet Congress did not alter

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[8] Those amendments also clarified that the government's duty to arrest a criminal alien was triggered when the alien was released on parole. See 8 U.S.C. 1252(a)(2)(A) (1988 & Supp. IV 1992) (shall arrest "upon release of the alien (regardless of whether or not such release is on parole")). Section 1226(c) contains similar language.

the general prohibition against releasing "such felon." The choice to leave that language unchanged provides "convincing support for the conclusion that Congress accepted and ratified" the INS's understanding that "such felon" referred to any alien with the requisite criminal history. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015); see *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 244 n.11 (2009). The Executive Office for Immigration Review (EOIR) thereafter issued regulations addressed to immigration judges, again interpreting the general prohibition against release to encompass any detained alien with the requisite criminal history. See 57 Fed. Reg. 11,568, 11,572 (Apr. 6, 1992) (8 C.F.R. 3.19(h)) ("An alien in deportation proceedings who has been convicted of an aggravated felony *shall not be released from custody on bond*," except under the new exception for lawfully admitted aliens) (emphasis added).

3. In 1996, Congress amended the statute twice against the foregoing cumulative backdrop, ratifying the government's position twice more. First, it eliminated the exception for lawfully admitted aliens. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1277. Second, Congress adopted the current mandatory-detention provision, Section 1226(c). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(a), 110 Stat. 3009-585. In so doing, Congress expanded the reach of mandatory detention to aliens convicted of other serious crimes (in addition to aggravated felonies) or who had engaged in terrorist activities, see 8 U.S.C. 1226(c)(1), and added a

narrow exception allowing release "only" for witness-protection purposes, 8 U.S.C. 1226(c)(2).[9]

Notably, however, Congress once again made no material change to the general prohibition against release. The first sentence now directs that the Secretary "shall take into custody any alien" who has the requisite criminal history, "when the alien is released." 8 U.S.C. 1226(c)(1). And the second sentence now prohibits the release of "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). But there is no material difference between that language and its predecessors.

First, the only apparent difference between the new phrase "an alien described in paragraph (1)" and its predecessor ("such felon") is that the phrase "an alien described in paragraph (1)" is broader, because Congress mandated detention of some criminal aliens who are not aggravated felons or indeed felons at all. Under either version, however, the second sentence equally prohibits the government from releasing from immigration custody any alien who has the requisite criminal history.

Second, the new clause "when the alien is released" and its predecessor ("upon release of the alien") both tell the Secretary when to arrest the alien, and presuppose that the Secretary already knows who "the alien" is. And if anything, "when the alien is released" is *less*

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[9] There is legislative history documenting Congress's decision to create a witness-protection exception. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 230 (1995). But there is no mention of exempting criminal aliens from mandatory detention based on a gap in custody. Congress also enacted transitional rules to govern the interim period before Section 1226(c) went into effect. See IIRIRA § 303(b)(3), 110 Stat. 3009-586. The transitional rules similarly prohibited the release of any alien with the requisite criminal history, without regard to any gap in custody. See *ibid.*

susceptible to respondents' construction than "upon release of the alien." The word "upon" means "immediately following on; very soon after." *Webster's* 2518. But "when" can also mean "at or during the time that" ("while"). *Id.* at 2602; pp. 17-18, *supra*. It is thus consistent with the text of the current statute to say that each named respondent here, for example, was taken into custody "when the alien [wa]s released," 8 U.S.C. 1226(c)(1), because each was taken into custody "during the time that" or "while" he was free from criminal custody. In any event, the adverbial timing clause is irrelevant to the detention mandate in paragraph (2).

Section 1226(c) is thus the result of a repeated dialogue between Congress and the Executive, where (1) Congress prohibited the release of aliens from detention if they had the requisite criminal history; (2) the Executive issued regulations interpreting that general prohibition to apply to any alien with that criminal history, regardless of any gap in custody; (3) Congress then amended the statute, but without making any material change to the general prohibition against release; and (4) the cycle repeated, with the Executive issuing new regulations saying the same thing and Congress once again amending the statute without material change. This repeated cycle of congressional ratification strongly supports the BIA's interpretation of the statute: Removable criminal aliens do not become exempt from mandatory detention if the government is delayed in arresting them.

F. The Court Of Appeals' Counterarguments Lack Merit

1. In reaching a contrary result, the court of appeals reasoned (Pet. App. 16a) that the BIA's interpretation improperly "de-links the 'Custody' directive in § 1226(c)(1) from the bar to 'Release' in (c)(2)." The

court believed that if DHS did not arrest a criminal alien "promptly," *id.* at 6a, then any later arrest of the alien must have been pursuant to Section 1226(a), and that it would be inconsistent with the structure of the statute for Section 1226(c)(2) to prohibit the release of an alien who had been arrested under Section 1226(a).

That analysis is doubly flawed. First, as set forth above, see pp. 27-30, *supra*, the premise is incorrect. Regardless of whether DHS arrests a covered criminal alien promptly, it still arrests him as required by Section 1226(c): DHS is fulfilling its duty under Section 1226(c)(1) to "take into custody any alien who" is removable because the alien has the requisite criminal history. 8 U.S.C. 1226(c)(1). And paragraph (2) still prohibits DHS from releasing that alien, because he is still "an alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). Accordingly, under the government's interpretation, the two paragraphs work "hand in hand." Pet. App. 15a.

Second, the court of appeals' structural argument is misplaced. Paragraph (2)'s prohibition against release does not depend on whether the government arrested the criminal alien immediately upon his release from criminal custody (or promptly thereafter). Rather, it prohibits the release of any "alien described in paragraph (1)," and the clause "when the alien is released" does not describe the alien; it tells the government when to arrest "the alien" who has already been described. See pp. 13-21, *supra*. Accordingly, it would not matter if the government were thought to have arrested such an alien on authority in Section 1226(a). He would still be an "alien described in paragraph (1)" of Section 1226(c), and paragraph (2) would prohibit his release.

That understanding also fully meshes with the text of Section 1226(a). The first sentence of Section 1226(a)

provides that, on a warrant issued by the Secretary, an alien "may be arrested and detained" pending a decision on his removal. 8 U.S.C. 1226(a). The second sentence of Section 1226(a) then addresses continued detention or release of the alien. It provides that, "*[e]xcept as provided in subsection (c)*," the Secretary "may continue to detain the arrested alien" or "may release" the alien on bond. *Ibid.* (emphasis added). Thus, by the plain terms of Section 1226(a), if a criminal alien is arrested under the authority of the first sentence of Section 1226(a), his continued detention is still governed by Section 1226(c)(2) and its prohibition against release.

2. The court of appeals also asserted (Pet. App. 22a) that Congress's aims of preventing flight risk and dangerousness "are ill-served when the critical link between criminal detention and immigration detention is broken and the alien is set free for long stretches of time." That reasoning too is doubly flawed. In the first place, the injunctions here exempt criminal aliens from mandatory detention if they are not arrested "immediately." *Id.* at 8a, 59a. And the court of appeals affirmed those injunctions on the basis of its conclusion that the arrest must occur "promptly." *Id.* at 6a, 59a. There is no sound basis for concluding that every criminal alien's risk of fleeing or reoffending is categorically lower whenever there has been any gap in custody or the arrest has not been "prompt."

More fundamentally, however, Congress was not concerned about a link between "*criminal detention*" and "immigration detention." Pet. App. 22a (emphasis added). Congress was concerned about the link between an alien's *criminal history* and an increased likelihood that he would later flee or reoffend. See *Rojas*, 23 I. & N. Dec. at 122; Senate Report 2 (discussing risks

posed by "nondetained criminal aliens"). And a gap in custody does not undo an alien's criminal history.

The court of appeals further hypothesized (Pet. App. 22a-23a) that, "without considering the aliens' conduct in any intervening period of freedom, it is impossible to conclude that the risks that once justified mandatory detention are still present." But Congress made a determination that detention should be mandatory for any alien with the requisite criminal history, regardless of any other factors. And it is not "impossible to conclude" that there is a sufficient causal link between an alien's criminal history and the probability he will flee or commit more crimes if released on bond. This Court concluded that "[t]he evidence Congress had before it" of that causal link "certainly supports the approach it selected." *Demore*, 538 U.S. at 528.

There is no hint in the text, structure, history, or purpose of Section 1226(c) that Congress wanted immigration judges to consider individually a criminal alien's conduct after release from criminal custody. That is especially so because Congress unambiguously prevented the individualized consideration of a criminal alien's conduct—other than his criminal history—during any other span of time. Congress thus prohibited consideration of an alien's conduct during "any intervening period of freedom" (Pet. App. 22a) between when the alien committed the underlying crime and when he was arrested for it, or while he was released on bond during the pendency of those criminal charges; his conduct during his incarceration; or even his conduct before the underlying crime. Respondents have provided no basis for concluding that Congress intended the alien's conduct after his release from criminal custody to be the

unique exception to Congress's categorical approach that is mandated by Section 1226(c).

II. The BIA's Correct Interpretation Of The Statutory Scheme It Administers Warrants Deference

For the reasons set forth above, by far the best interpretation of Section 1226(c) is that it does not exempt criminal aliens from mandatory detention if DHS does not arrest them immediately. At a minimum, the BIA reasonably interpreted Section 1226(c), and that decision warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

"Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment) (deferring to BIA under *Chevron*); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Those holdings reflect the INA's statutory direction that the Attorney General is charged with the administration of removal proceedings, and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)); see 8 U.S.C. 1103(g); p. 2 n.1, *supra*. Because the Attorney General has vested his adjudicative and interpretive authority in the BIA (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference." *Aguirre-Aguirre*, 526 U.S. at 425.

Here, in a precedential en banc decision, the BIA adopted by far the best interpretation of the key statutory phrase, an "alien described in paragraph (1)." See *Rojas*, 23 I. & N. Dec. at 125. After thorough analysis,

the BIA concluded that that phrase is properly understood to refer to the clause in paragraph (1) that describes the alien on the basis of the criminal history that makes him subject to mandatory detention, and not to encompass the distinct "when the alien is released" clause. *Id.* at 117-127. The court explained that its reading was supported by "the statutory language," "the object and design of the statute as a whole," and "the history of the mandatory detention provisions," and was "reinforced by practical concerns that would otherwise arise." *Id.* at 125; see *id.* at 117-125. That decision is at the very least reasonable and warrants deference.

The court of appeals refused to defer to the BIA's interpretation because the court concluded (Pet. App. 19a) that Section 1226(c) "unambiguously" rewards criminal aliens with the opportunity for release if DHS does not arrest them promptly. But it is far from clear, to say the least, that Congress adopted such a rule, and indeed the word "promptly" does not appear in the statute. See *Lora*, 804 F.3d at 611 ("[W]e have little trouble concluding that [the statute] is ambiguous."); *Olmos*, 780 F.3d at 1322 ("Even with the statutory text, clues, and canons, a reader cannot tell from the text alone whether aliens remain subject to mandatory detention after a gap in custody."); *Hosh*, 680 F.3d at 378 ("§ 1226(c) may arguably be susceptible to more than one interpretation," but the BIA's interpretation "is a permissible, and more plausible, construction.").

If anything, for the reasons set forth above, the statute unambiguously forecloses the court of appeals' interpretation, when the statutory language is read in light of its structure, context, purpose, and history, and this Court's precedents. See *Sylvain*, 714 F.3d at 157 (declining to decide whether *Chevron* applies because

"nothing in the statute suggests that immigration officials lose authority if they delay"). Section 1226(c)(2) prohibits the release of any alien described in paragraph (1), and paragraph (1) describes criminal aliens on the basis of their criminal history—not by how long they were released before DHS arrested them. In adopting Section 1226(c), Congress ratified the Executive's preexisting view that detention was mandatory, without regard to a gap in custody. And as this Court's precedents establish, it would be improper for a court to impose the consequence of exempting a criminal alien from mandatory detention for any delay by the government. That result would contravene Congress's fundamental purpose in mandating arrest and detention of criminal aliens in the first place, by exposing the public to the very dangers of flight and recidivism that Congress enacted Section 1226(c) to prevent.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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